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TO THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

MIDDLE WEST CONSTRUCTION, INCORPORATED,

Petitioner,

vs.

THE METROPOLITAN DISTRICT, Respondent,

No. 84.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

The plaintiff prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on March 6, 1943.

STATEMENT.

This action resulting in the judgment entered by the United States Circuit Court of Appeals for the Second Circuit March 6, 1943, was brought in the United States District Court for the District of Connecticut on the ground of diverse citizenship, plaintiff being an Ohio corporation and defendant a municipal corporation organized under the laws of Connecticut.

The parties entered into a contract June 16, 1937 which called for construction by plaintiff of a section of an intercepting sewer in Hartford, Connecticut. The work was to be completed by December 31, 1937, and payment was to be made at unit item prices listed in the contract. The total cost of said section, so figured, came to \$136,639.93, but

from this sum defendant deducted \$3,540 under a clause in the contract providing for liquidated damages for delay in completion. The actual cost to plaintiff, according to its books, kept in regular course of business and in evidence, exclusive of profit, but including depreciation of tools, obsolescence and repairs, amount to \$159,908.12. A reasonable profit on the work, including extras or new and additional work, is \$40,000, making the total cost \$199,908.12. It is the claim of plaintiff that various items of work were extras or were required by the engineer to be performed in a manner not contemplated by the contract and that consequently it is entitled to additional compensation and to additional time for completion of the sewer. The complaint contains fifteen (15) claims for extra compensation *under the terms of the contract*, or for *new or additional work, not within the scope of the contract*, and upon which the minds of the parties never met, and as to which the terms of the contract do not apply, aggregating \$65,092; and one for recovery of the sum retained by defendant as liquidated damages, amounting to \$3,540, as to which latter, no counter-claim was pleaded.

It is the claim of plaintiff that in the course of constructing said sewer, it encountered certain underground conditions, subsurface structures, and deviations from those represented to exist in the documents submitted to bidders, and upon the bases of which, it made its bid and entered into the contract. Defendant also gave verbal and written orders and instructions requiring plaintiff to construct parts of said sewer by methods and means, and consisting of structures vitally different in character and cost from those described in said documents which defendant refused to pay for, either as extras under the contract, or as new and additional work not within the scope of the contract, upon which the minds of the parties never met in making the contract. Some of the underground conditions and subsurface structures so found were unknown to exist by either when the contract was made; others were substantially dif-

ferent from those represented to exist when the contract was made; while still others were known by defendant to exist and that they would materially affect the work to be done, but were not disclosed to plaintiff, and were first encountered in opening the trench. As a result, plaintiff suffered delays and extra expense in carrying the contract to completion.

Trial by jury was waived by stipulation and the case was tried to the court. The trial judge made a detailed, but incomplete findings of fact (R. 25-45); both parties then designated certain of the Evidence to be used on appeal, and by Order of the United States Circuit Court of Appeals for the Second Circuit, three (3) Transcripts of Evidence was made a part of the Record, without printing; and a like Order entered making all Exhibits a part of the Record without printing and without furnishing any copies thereof. (R. pp. 125-130). The trial judge denied recovery on all fifteen (15) claims, and entered judgment for plaintiff to recover \$2200 on the claim for Refund of Liquidated Damages (R. pp. 25-47), and said judgment was affirmed by the said Circuit Court, and judgment entered therein on March 6, 1943. (133 F. 2d 468-470).

As the contract is a voluminous document, supplemented by four blue print plans; and the Transcript of the Record consists of the three (3) parts: Printed Record, Three Transcripts of Evidence, and all Exhibits, an intelligent presentation will necessarily be lengthy, so it is in the interest of brevity and clarity to incorporate them herein and make them a part hereof and to refer to relevant parts thereof in the supporting brief filed herewith, as they would necessarily have to be repeated in the argument to clearly expound the questions of law as to the proper construction of the contract and its application to the specific claims. There are also general propositions of law arising out of their construction and application in a discussion of which other parts are needed to clarify the points argued. A brief summary of general facts which were admitted or undisputed is as follows:

On May 11, 1937, respondent advertised for bids for this work, specifying they would be publicly opened at its office on May 25th, 1937; the contract, blue prints and specifications—herein called the documents—were furnished to plaintiff to furnish it with all the information necessary to enable it to figure its bid; they were based upon an investigation by respondent through its expert engineers and technicians over a period of time, beginning in 1934 and particularly in the Winter of 1936, and consisted of making testpits, taking borings, searching its own and utility records, maps and data concerning underground conditions and structures; consulting owners of property adjacent to the work concerning private sewers, drains and underground structures likely to be encountered in the trench or adjacent thereto; transferring this information to the blue prints in detail, all of which was done under the supervision of Mr. Willard S. Brewer, respondent's Engineer in Charge. Defendant expected and intended bidders would rely upon and act on these documents as the basis of figuring bids for the work, and knew that if they contained errors or mistakes a bidder would be at a disadvantage. (Mr. Brewer's Evid. p. 914); it did not expect bidders, in the time interval between advertising and bidding, to make an independent investigation of the underground conditions and structures, but only to examine surface objects and conditions visible to them along the trench or adjacent thereto; there is no practical way for a bidder to ascertain facts about subsoil conditions, and subsurface structures, as they would have to use the same sources of information and it did not expect them to do so, but to make their bids on the basis of the facts indicated on the documents. (Mr. Brewer, Ev. pp. 929, 968-970). Plaintiff relied upon these documents and submitted its bid of \$136,239.75. (Ex. I). Other bids ranged from \$139,000 to \$250,000. (Ex. QQ). It was opened May 25, 1937 and was accepted as the lowest bid. On June 3, 1937, said Brewer wrote a letter to defendant's Manager, Ex. 22, in which he suggested as to several items that plaintiff's

bid was "unbalanced" so-called; this was shown to plaintiff's Manager, Mr. Paul Ciraci, and a reply Ex. 25 was made thereto, stating plaintiff was willing to "carry this contract through in accordance with the plans and specifications." Ex. PP shows without contradiction that by having submitted its bid as it did, plaintiff reduced its losses by \$4211. The full contents of these three exhibits are incorporated herein.

The contract (Exhibit A) contained the usual exculpatory clauses (except one throwing all risk of loss on plaintiff by reason of "unforeseen difficulties" or unanticipated circumstances). For brevity, these clauses purport to throw all risks of loss on the contractor for everything encountered in the trench or concerning the work "whether shown on the plans or not"; "he shall do all pumping, drainage and exclusion of water from the trench" and "support, protect and maintain all pipes, conduits, sewers, drains of all kinds in the trench or adjacent thereto." (Ex. A, p. 28 (3); p. 49, par. 28; p. 50, par. 29; and others referred to by the Courts). These same provisions contain restrictive words, such as "which may be damaged by the work herein contemplated" (Ex. A, p. 49, par. 28); "in accordance with this contract and the specifications" (Ex. A, p. 28(3); and "in accordance with this contract and the specifications which are made a part hereof" (Ex. A, p. 20). The "Engineer to be judge" clause, Ex. A, p. 21, par. C, also restricts him to enumerated things "under this agreement." The provisions for "Changes and Extra Work, Ex. A, pp. 21-22, par. D, and other relevant provisions will be discussed under specific claims in the brief and are incorporated herein.

Plaintiff made two (2) requests for extensions of time to complete the work (Exs. U & V). Defendant promised to give due consideration when the work was completed, but instead assessed and retained the full amount provided in Ex. A, p. 24, pars. 2 and 3; no evidence was offered by it to show actual damages; and no counterclaim was pleaded

under Rule 13 (a) as required. In this, and as to all other claims it relied upon the *letter of the contract*.

Claim No. 1. Special Cradle Work. \$22,626.

The first and largest claim is based on what is called *preformed cradle construction*. This was ordered to be used in *four areas* for a total distance of 1093' and the dispute is whether this type of construction was an extra or was called for by the contract and whether it delayed the work and caused increased expense in labor and material because of its character and cost arising out of this method of construction.

Both Courts found it was Type C construction by reason of payment clauses found in Exhibit C, (R. pp. 33 and 133 F. 2d 469). These are: "If pile foundation under reinforced concrete pipe is ordered, concrete cradle and pile cap will be paid for under the item for Class-A foundation concrete." And "Type C construction will be paid for at the price bid for Type A construction plus the cradle concrete and plus reinforcing if any is used."

A comparison of the actual methods of constructing the type of construction specified in the documents follows: Type A is the simplest, and involves excavating the trench, laying the pipe on the bottom of it and backfilling with sand, earth, or a mixture of both; under types B-1, B-2 and Type C, the procedure was:

The head machine excavated the trench continuing progressively along the line of the sewer; laborers followed, dressing the bottom of the trench, placing sills, if used, at the required grade; the tail machine then lowered the pipe into the trench; concrete was ordered, and if any delay occurred in delivery, the crew continued to lay pipe, and no time was lost; joints were poured after placing concrete fill; each morning pipe laid the day before was backfilled and dressed over. Under this method continuous progress

was made, efficiently and orderly, utilizing the full crew on productive work.

In the Special Cradle Work ordered under *Exs. F and G*, the procedure was:

The head machine excavated one section, 30' to 40' long; the inspector was consulted and he ordered this cradle put in; the head machine, its operator and its signal man had no more work for the day on this machine, and worked as common laborers; a truck was sent for reinforcing steel; forms were built at sides of the cradle, and steel placed and wired; concrete was ordered, and if late in arriving the crew was necessarily idle; when concrete was placed, the surface was screeded (shaped boards to conform to the contour of the pipe were drawn back and forth by two men to shape the soft concrete) to the required form. As the length of each section was restricted by defendant to 30' to 40' per day, delays were caused when a section was completed too late to complete another that day. For the subsequent 2 to 7 days (the average curing period was conceded to be a minimum of 4 days in summer—*Mr. Brewer, Ev. pp. 892-3*), the concrete was kept wet to assure proper curing and when cured all dirt that fell into the trench was removed by hand and the cradle swept and rough spots cut by hand. The tail machine, which with its operator had done no productive work during the curing, placed pipe on the cured cradle. The pipe was then wedged up by hand to proper grade; surface of the cradle wetted, and grout mixed, poured and rodded, all by hand, until the entire space between cradle and pipe was solidly filled. The joints were then poured. This method was completely discontinuous, the crew disorganized and they worked inefficiently. Under the contract laborers were required to have 40 hours weekly, so they could not be laid off; and local labor conditions were such that those laid off found other jobs at regular time; they could not be used at other areas, as operating one crew at several locations would have been equally disorganizing and unproductive; additional equipment would

have been necessary to have sent them to other areas; the machines in use could not be moved to other places due to limited working space in most areas—fenced in, dykes, and other conditions. (Mr. Brewer, pp. 864-866). Systematic planning was impossible as plaintiff usually had to wait until the trench was excavated before the inspector ordered the cradle put in.

In addition to the indirect cost of these delays by the method of construction required here, direct expenses resulted because a much wider trench, usually more than $2\frac{1}{2}'$, had to be dug for the men to operate as described, increasing excavation, backfill and surface dressing about 75%; additional lumber, sand and cement for grout cost about 50¢ per linear foot. Mr. Brewer conceded that no wider trench, no greater backfill and no more landscaping were required for Type C than in A, B-1 and B-2 construction. (pp. 944-45). Demonstrations of the different types of A, B-1 and B-2 construction were also conceded by him to be correct. (p. 947).

A summary of Mr. Brewer's Evidence, pp. 870-884, shows: On June 30, 1937, he handed Ex. F to Mr. Ciraci; the latter stated that "grouting", that is, to lay the pipe on the preformed cradle, with a grouting, he didn't think was included—it wasn't specified in the plans; he stated this when he began to lay the pipe; "I said that method had been developed during this Metropolitan Sewerage work, and I had to admit that it wasn't specified concerning the grout on the plan. In fact, there was no description of that method of construction in the specifications . . . it was not described . . . It does not state the method of laying pipe on the precast cradle . . . " (pp. 870-884). "Mr. Ciraci said he could lay Type B faster than he could (this type) and for that reason would have liked to have laid it in some of these locations . . . In fact, on sills, he could lay faster than he could with the preformed cradle." (p. 881). The Court: "I understand that he did make some protest along two lines. The first was that he could lay Type B faster,

whatever name he may have used in describing it, and the other was that he was having to do extra work on the grouting." Mr. Brewer: "That is right . . .".

Mr. Brewer knew of no place other than Hartford where precast cradle had been used; he intended to use preformed cradle in the areas ordered without reference to subsoil conditions although he admitted there was nothing in the documents to call attention to bidders of that fact, except Types A, B and C, and general statements in the payment clauses (pp. 939-942). Ex. G was handed to Mr. Ciraci by Mr. Brewer about October 26th, 1937, and is another detailed drawing of a double 39" cradle ordered by defendant and constructed by plaintiff for about 182' North of No. 2 Crossing. In each of these, Exs. F and G, "grout", a stiff mixture of sand, cement and crushed stone, is shown between the cradle and the pipe. There was no grout shown on the documents submitted to bidders. Grout indicates that the cradle had to be performed. (pp. 946-947). It was undisputed that no pile nor pile caps were used throughout the entire work. No reference was made in the documents that defendant had required the use of preformed cradle in three other contracts.

Plaintiff claims that it made protests to Mr. Brewer concerning this preformed cradle work at the very beginning, and Mr. Brewer promised that if anything that the defendant ordered was an extra plaintiff had no need to fear as it always paid contractors fairly for extra work ordered by it; and that this was confirmed by later conversations. (Ex. H. pp. 2 and 3). Other admitted or undisputed facts will be set forth in the brief, which are incorporated herein.

Claim 2. Extra Pumping. \$8345. Compl. 8.

The District Court's Memorandum is found in the Printed Record, pp. 36, 37, and decides, as a matter of law, that Ex. A, p. 50, par. 29 exonerated respondent from liability, and the claim clearly untenable; that from the notations on the

plans and the "personal examination by Mr. Ciraci of all the terrain before the bid was made, there seems no excuse for a misunderstanding here." *Later the trial Court applied this principle to other underground structures and conditions.* This decision was upheld on appeal and on the further ground that before the contract was signed, Mr. Ciraci knew there was no outlet at Farmington Avenue, and the claim was untenable. The Findings of the trial Court do not support the Circuit Court's decision, as the Finding and Conclusions of law are based *solely* on "the personal examination of the terrain" by Mr. Ciraci and *omits any findings as to Mr. Brewer's promise that this outlet would be ready in about 6 weeks after work on this contract was commenced.* Both Mr. Buck and Mr. Ciraci interpreted the "dotted lines" as indicating and representing an "existing outlet" through which water (Mr. Buck, p. 916-7; Ex. H, pp. 21-23), would have drained by gravity—in a gravity sewer.

This interpretation respondent did not dispute, but asserted that it would not have permitted it to be used to drain this water, although it admitted there was nothing in the documents submitted to bidders to indicate such fact, or that water would have to be pumped, or that it was dead end nor anything to indicate to a bidder that it was not available. Mr. Brewer testified he though it would have have been better and fairer to have made some such notation on the plans. (Evid. p. 915); an outlet is of tremendous importance (916); and that at no time did petitioner have an outlet until construction was nearly complete, about which nothing was said in the plans (918); and that good engineering practice is to construct from low to high ground so as to get drainage (920); no reference was made to contract No. 16 as being incomplete or under construction or anything that would give notice that there was no outlet except the specification "that the contractor must take care of all drainage." (917) Ex. B bears notations "Beginning of this contract" — "End of contract." (Seemingly, the Courts interpreted this as notice that No. 16 was incomplete,

whereas we claim it simply means the *dividing point* between the work under these contracts). Mr. Brewer testified that from Farmington Avenue to Asylum Avenue (where the extra pumping was done) there was no outlet to the river. (934). There was nothing in the documents submitted to bidders to indicate respondent expected the work in the low ground to be done in Summer. (p. 931). By putting the River Crossings first, any outlets to the river were cut off. Respondent required these crossings to be done before the work between Asylum and Farmington Avenue was begun. (p. 933). There was no information to bidders to indicate how this item of pumping would be affected other than a general reference to this project being part of a larger project (pp. 914-4); the usual good engineering practice is to construct from low to high ground (p. 920).

Mr. Buck testified that good practice and fair treatment of contractors dictate the plans should include all information, so a contractor could make an intelligent bid and analyze what the engineer would require him to do, without which it is impossible to make a reasonable estimate (p. 768); the plan, where no outlet exists, should be noted as such to apprise contractor of what he has to do; it is good engineering practice to construct from low to high ground (p. 769); it is very important to have an outlet and explains reasons (770); if no outlet exists, it would considerably increase the cost (p. 772); and in this particular case where the underdrains were picking up and discharging water right at the point where contractor is digging the trench and laying pipe, it would increase the difficulty of his work immeasurably (p. 770); under other circumstances, all such water is automatically carried away by the completed section of the sewer, so all a contractor has to do is to pump the water which actually comes out of the ground in the trench he has opened and in which there is no sewer; a small pump at the front of the pipe then passes that back into a few lengths of pipe and it flows away down the sewer (p. 770); the work would be disrupted and disorgan-

ized by these items of extra work; the *standard clause about pumping the water did not include this item in the prices bid—only pumping and keeping his working point dry where he was laying the joints*; there is nothing in this clause to require contractor to pump, at no extra cost, water collecting in the trench because of no outlet, (p. 805-6); the sewer here was gravity flow and naturally would carry off the water through an outlet had it existed. (p. 803-4).

In every other place, where petitioner had experience, such an outlet, as indicated here, could be used to drain the trench (Mr. Ciraci, p. 377); he made no protest about the increased cost because, before this work was done, Mr. Brewer had told him that anything he did extra would be paid for; he relied on Mr. Brewer's promise that the outlet would be ready in six weeks and made his plan of operations accordingly, (pp. 382-387); he relied on Mr. Brewer's word because he thought he could believe the Engineer in charge (p. 386); a ball cap could have been placed at the outlet to catch dirt and other objectionable things and keep them out of the sewer. (p. 386). Had Mr. Ciraci known no outlet would be available until the job was done he would have withdrawn the bid (Mr. Ciraci, p. 751).

The Printed Record, together with the Evidence and Exhibits are made a part hereof for brevity as well as other facts set forth in the Brief.

Claim 3. Conflict with Underground Structures. \$11,835.

The District Court's Memorandum is found in the Printed Record p. 37, and respondent is erroneously exonerated from liability under Ex. A, p. 28(3) stating that the "price bid includes full compensation for removing or protecting, without cost to the District" all such pipes or obstacles, whether shown on the plans or not; and p. 49, where the contractor agrees to do everything necessary to protect all such pipes and drains, without cost to the District, and the notation on the blueprints that the plans were not warranted to be

"even approximately correct." This the Circuit Court upheld (133 F. 2d 470, par. 4). Both Courts arrived at their conclusions as a matter of construction of the contract, *a question of law*, and that no recovery could be had under the contract as no written claim had been made as provided therein.

This claim involves five (5) items:

1. On Ex. C, a 4" gas pipe is shown lying outside the *east line of the sewer* in the southerly part of Woodside Circle; as encountered, it was a *little to the west of the center of the trench* and had to be *moved*, as directed by respondent, for a distance of 400', in 100 feet sections, so petitioner had to dig a trench at the side of the pipe to the depth of the gas pipe and finish the bottom by hand. Each section took 1 day's work; the gas company removed the pipe the next day and petitioner back-filled the trench so he could further excavate by machine—an additional day's work—or a total delay of 8 days; at Station 81/100 the gas company *made a loop* offsetting the pipe to the east, running the pipe north some distance and then diagonally across the sewer to the west side where it was connected with the existing pipe. *It was necessary to excavate by hand here, delaying the work 2½ days. No loop was indicated on the documents submitted to bidders.* The gas company sued for and recovered damages from petitioner and the case was settled for \$225. Beyond this point the sewer was moved east to miss the gas pipe, and for another 500' the machine excavating the trench had to operate off-center on account of the proximity of the east curb, *which slowed and materially delayed the progress of the work for 11 days*, all in addition to normal time of doing it. *The most the plans indicated was that this pipe might be close to the trench and have to be supported, but not removed and replaced, as was done.* (Evid. p. 479-482). Respondent's testimony here was vague and shows scant knowledge of the difficulties encountered (pp. 956-8); 1018-1020). Petitioner's detailed statement of

Claim No. 3 is found in Ex. H. pp. 25-28, and *shows additional costs of \$11,835. The District Court held that no recovery could be had on this claim because it involved underground structures and was covered by the same legal principles of construction as Claim No. 2, where the personal examination by Mr. Ciraci exonerated respondent from liability. (R. p. 37).*

2. At the northerly end of Woodside Circle an 8' water main is shown on Ex. C crossing the line of the sewer. As *encountered it was found to lie directly over the sewer for 80', and it was necessary to excavate much wider to provide room to let it down into the trench. It also had to be permanently shored up to protect it from settlement. 8 day's delay was caused thereby.*

3. A stone foundation of an old house buried 1' beneath the soil was encountered; *neither party knew of its existence until encountered. It was 25' long, 6' deep, and 2½' wide, and had to be cut up by air hummers and removed; as this was residential section and utilities such as gas, water, etc., existed underneath, explosives could not be used. Delay 2 days.*

4. At the northerly end of Woodside Circle respondent required petitioner to build concrete foundations under a sewer pipe 190' long by 2' wide by 5' deep, using 70 cu. yds. of concrete *in forms*, not covered by Item 8, p. 79, Ex. A, but by Item 15. The difference in cost is \$525.

5. *This and the preceding 4 Items of Claim No. 3 made it necessary to open up a greater width of paving than would have been required under the plans and specified, and in places respondent required pavement not damaged to be refinished. Extra cost, \$566.62.*

Claim 4 Stone Foundation. \$428.

This is a relatively small claim for stone foundation that worked into soft soil. It is an *extra* under the terms

of the contract. The District Court rejected it because of Ex. A, p. 46, par. 16 requiring the removal of soft soil. (R. p. 38) However, the same paragraph states that such soft soil so removed shall be replaced by crushed stone; and paragraph 17 Ex. A, p. 46 provides for payment for such stone.

Claim 5. Testing River Crossings. \$2281.

All River Crossings were admittedly constructed in exact accordance with details shown on Ex. E, Sheet 4, and covered by specifications, Ex. A, pp. 73-76 pars. 89-97, inclusive. Respondent's Engineer admitted that he supervised these crossings; knew what was done every day—ordered them to be placed on stone foundations; that in the course of construction they showed settlement; that a stone foundation, in his opinion was sufficient; and there was no complaint as to workmanship or materials and he was satisfied with it. (Mr. Brewer's Evid. pp. 955-6). Ex. A, p. 53, par. 40, authorized the Engineer to reject faulty materials. The testing of three crossings was not requested by respondent, under Ex. A, pp. 68-9, until completed and backfilled and it increased the expense and difficulty radically to wait until all this has been done. (Mr. Buck's Evid. 778-80; Ex. H, pp. 30-32); and it was undisputed that good engineering practice requires testing to be done when the joints are made, and before closing chambers, back-filling and otherwise completing the work. (Mr. Brewer's Evid. pp. 895-7; 778-80). In waiting an unreasonable time to require the testing the respondent waived same and is estopped to refuse payment.

Claim 6. Private Drain. \$175.

A private drain the existence unknown to either party, until encountered, had to be moved. The District Court refused recovery because it was an underground structure, subject to the same considerations as in No. 3 (R. p. 38).

The Court on appeal did not discuss, specifically, any claims except Nos. 1, 2, 3, and 15. It is purely a question of law as to the proper construction of the contract.

Claim 7. Additional Lumber. \$575.

Petitioner left in place 155 thousand board feet of lumber because, in Mr. Ciraci's opinion *removal would endanger the new sewer and existing structures*, which the District Court held an unauthorized act, since the contract committed this judgment to the Engineer under Ex. A, pp. 45, 46, pars. 14, 15. The latter part of the same paragraph 14, states: "... but it is expressly understood and agreed that the ordering in, or failure to order in, said sheeting and bracing, shall not relieve the contractor from the responsibility for any damages whatever due to the failure of said sheeting or the settling of the filling of the trench, or of the ground adjacent thereto." It is a question of law and depends on the construction of the contract.

Claim 8. Reinforcing Steel. \$199.

Item 16 Ex. A, p. 81—a special provision—provides for payment of all reinforcing steel in special structures, and any additional steel, if any is ordered. Respondent admitted about 600 lbs. were ordered but not paid for by it (p. 1006). It is, however, a small item.

Claim 9. Sewer Conflicts. \$1243.

The Condensed Statement (R. pp. 66-67), supported by Mr. Ciraci (Ex. H, pp. 38-40), Mr. Buck's evidence (pp. 785, 810-811) and respondent's Inspector, Kilby, (p. 1093-5) shows that petitioner built at least 2 bulkheads when the plans required only one. The other part of the claim is based on breaking out and pressure grouting the old sewer because the "inside dimensions" were shown, contrary to good engineering practice, *as there was no note that the old sewer would have to be cut away and pressure grouted*, (Mr. Buck, pp. 785, 810-811).

Claim 10. Pumping Sewage. \$299.

Respondent paid for the bypassing of a private drain on the Day property as an *extra* (Ex. 6) but refused to pay for pumping the sewage which flowed from it while it was in existence. *Neither party knew of the existence of this drain until encountered in the trench.* The District Court held Ex. A, p. 50, par. 29, exonerated respondent from liability.

Claim 11. Diverting Old Sewer. \$325.

At Station 53/70 the existing 27" brick sewer first conflicted with the construction of the new sewer, and Mr. Brewer ordered the sewage from it diverted to the river; No. 3 gang worked all of one day making this diversion and four laborers the next day to make a connection at the man-hole. Respondent admits 90' were relaid, while petitioner claims for 130'. The District Court excluded the claim under Ex. A, p. 50, par. 29.

Claim 12. Tunnelling under Trees. \$1225.

Petitioner was directed by respondent to tunnel under a 2' oak tree on the Williams property, by driving a sheathed tunnel 50' underneath it; respondent claimed it was a cap and leg tunnel, and that it was only for 12'. A sheath tunnel and a cap and leg are the same (Mr. Kilby p. 1129). *It was undisputed that no tunnel work was shown on the plans at this point.* The District Court held that Ex. A, p. 76, par. 98, provided for tunnelling where necessary to avoid damage to trees or roots.

Petitioner claims, under Ex. A, p. 77, par. 100, respondent expressed *its intention for owners to remove trees*, and claims under Item 1, Ex. A, p. 13 at the unit price bid of \$40 per linear foot. Respondent paid for it under Item 2A, at \$15.50 per linear feet. The difference is \$1225.

Claim 14. Special Foundation Seal. \$1843.

This claim is based on hand-mixing and spreading special concrete *fill* for a distance of about 2345 feet where ordered as a fill as the quantity needed at any one time was too small to order ready-mixed and chuted into the trench as contemplated in the documents. The District Court found respondent's records show at least 1122.5 feet of this type used on the job (R. p. 40). Where none of this fill was ordered, three pipe were laid at a time using the tail machine and one-half the crew; pipes were lowered into the trench, set to grade, and the work proceeded—occupying about 45 minutes; but where this fill was ordered, it was necessary to *mix concrete by hand, lower it into trench, spread it, remove the bucket, pick up the pipe and set it in place on the concrete and the procedure repeated for each three-pipe*. This work was all in very deep cut where all material had to be handled into the trench by crane—the procedure for each three pipe took about 2 hours. The pipes were 8' long, and $97\frac{1}{2}$ operations times $1\frac{1}{4}$ hours delay equals $15\frac{1}{4}$ days, but computed only against one-half of gang No. 1 without job overhead, making \$1843.01, including profit of 15%.

The District Court construed Ex. C as authorizing the Engineer to order it under Ex. A, p. 46, par. 17; we claim payment under Item 9, p. 79 of Ex A, a "Special Provision", and Ex. C which specifies a "minimum-thickness of fill of 6". The same result would be reached by Ex. A, p. 71, par. 82 construed with Ex. C (Mr. Buck, pp. 816-17) (Ex. H, pp. 45-46).

Claim 15. Winter Work. \$14,205.

Mr. Ciraci, after studying the plans, specifications and the site of the work, the organization of crews, and based on his long previous experience, expected to complete the work by December 1, 1937, but *by reason of the various delays hereinabove set forth*, did not actually complete it until April 1, 1938, doing work in inclement weather, floods, cold and

other winter conditions, which increased the costs of it by the amount of rental of equipment for periods when work was stopped by weather conditions, and the increased costs for prosecuting it under unfavorable conditions, and for which no other claim for additional compensation for delay has been before made. Ex. H, pp. 47-48, shows in detail the computation of delays and costs as to each gang, and the period when each gang was discharged, after deducting Sundays, holidays and any days of useful work done by any such gang, job overhead and all other items which might duplicate each other.

The efficiency of the men is figured at 50%, while defendant's testimony shows its figures based on 75% efficiency. Petitioner excluded Gang 2 from its computation because it was computed in Claim No. 1; and Gang 4 because it was not delayed in doing sheltered tunnel work. Job overhead is included for only Gang 1. A summary of these details results in Gang 1 being delayed 34 days at \$284.93, or \$9687.62; and Gang 2, 22½ days—without job overhead—at \$118.43, or \$2664.67, Total \$12,352.29, plus overhead and profit at 15%, Grand Total, \$14,205.13. The District Court found the delays not to have been due to any deviation from the terms of the contract, (R. p. 41) and the Circuit Court agreed with its construction. (133 F. 2d 470, par. 5).

Claim 16.

The claim for refund of liquidated damages is based on our claim that the delays until April 1, 1938 proximately resulted from extra work ordered by defendant. In addition we claim that, respondent not having counterclaimed or cross-complained under Rule 13 (a) of the Rules of Federal Procedure, all of the liquidated damages retained by respondent should have been included in the judgment; and respondent waived its rights to retain them by not filing such a pleading. No evidence was introduced by respondent to show actual damages and no actual damages appeared to have been suffered by it. As our claims are for new and

additional work, delaying completion during the construction, Ex. A, par. I, page 25 does not apply and full recovery should be allowed.

QUESTIONS OF LAW PRESENTED.

May plaintiff, who claimed recovery on two (2) broad theories, recover under either of them, or partly under both?

These theories are:

1. May it recover outside of the contract on the basis of:
 - (a) Quantum meruit;
 - (b) New and different work, not governed by the contract provisions, and despite such provisions;
 - (c) On an implied contract, in law or in fact;
 - (d) Estoppel—including promissory estoppel;
 - (e) Unjust enrichment, where the status quo cannot be restored;
 - (f) Misrepresentation or fraud, actual or constructive;
 - (g) Mistake, mutual or unilateral;
 - (h) Breach of contract, restitution in damages, reformation by damages, breach of an implied warranty, in the nature of a breach of warranty;
 - (i) Unforeseen difficulties or unanticipated circumstances encountered for the first time in the trench, which makes it inequitable to throw the loss on plaintiff;
 - (j) Waiver, or estoppel and waiver combined;
 - (k) Concealments and non-disclosures;
 - (l) Quasi-contract, or other legal or equitable principles?

Or,

2. May it recover under the contract on any of the following tenable legal or equitable theories, despite the numerous exculpatory provisions, Exhibit A, pp. 8 (1) and (m); p. 13; p. 21, par. C; pp. 21-22, D (1) and (2); p. 28(3); p. 50, (29); and other provisions referred to in the decisions

and made a part hereof, inserted by defendant, the purpose of which was to throw upon plaintiff the assumption of all risks or loss—except risks or loss due to unforeseen difficulties or unanticipated circumstances, not contemplated by the parties when they made the contract—unless such provisions were strictly complied with to the letter, on the basis of:

- (a) Waiver or estoppel, or both combined;
- (b) A new or independent contract;
- (c) Promises of additional compensation;
- (d) Misrepresentation, innocent or otherwise; fraud, actual or constructive; mistake; breach of contract; breach or an implied warranty; in the nature of a breach of warranty; authoritative and misleading statements; restitution; reformation and damages;
- (e) Unforeseen difficulties or unanticipated circumstances (as above);
- (f) Any other legal or equitable theory which was claimed below?

SPECIFICATIONS OF ERRORS.

The Circuit Court of Appeals clearly erred:

1. In failing and refusing to follow the local laws of Connecticut on important questions of law, as laid down in the applicable decisions of its highest tribunal, the Supreme Court of Errors, which formed a material part of the contract, was embodied by implication, and the decisions of which are controlling as to the construction and application of the terms of the contract.

2. In failing and refusing to follow the applicable decisions of the Supreme Court of the United States.

3. In failing and refusing to follow the applicable decisions of said Second Circuit, and the decision is in conflict with the applicable decisions, the modern or better reasoned cases or applicable decisions of other United States Circuit

Courts of Appeals relative to the general law governing the construction of contracts.

4. The decision herein is contrary to the applicable weight of authority, modern authorities or better reasoned cases as to the general law governing the construction of contracts.

5. In accepting the findings of the trial court because they were clearly erroneous, in that said trial court erroneously held that the questions herein presented are primarily those of fact, that the principles of law do not seem doubtful, and that said principles of law claimed by plaintiff were inapplicable, when the problems presented were, in their essence, questions of law and reviewable on this petition by this Honorable Court.

6. In accepting the conclusions of fact of the trial court and adopting its conclusions of law based on said conclusions of fact and giving effect to same, because they are clearly erroneous, illogical, unreasonable, arbitrary, contrary to the admitted or undisputed facts, against the weight of the evidence, based on a strained interpretation, construction and application of the contract, plans and specifications, which renders it contrary to business sense and imposes upon plaintiff risks and losses that are inequitable, oppressive, overreaching, unduly onerous and impractical from a commercial standpoint — consequences not reasonably within the contemplation of the parties when the contract was made.

7. In holding that the contract is very clear that the plaintiff was to assume the risk of encountering underground structures and conditions, whether shown on the plans or not, and was to do everything necessary with respect to them without additional expense to defendant, in that it completely overlooks or disregards the restrictive clauses and special provisions contained in the contract, as well as the real expressed intention of the parties when they entered into it, interpreted, construed and applied in accordance with the

applicable decisions of Connecticut, and the general law, in a practical business way, and in a way to avoid injustice, hardship, oppression, loss to plaintiff, and forfeiture of increased cost of constructing the work, as it is conclusively presumed that both parties intended their contract to be fair and just in its operation and effect.

8. In holding, in effect, that by reason of two letters, Exhibits 22 and 25, plaintiff assumed all risk of encountering underground structures and conditions, whether shown on the plans or not, or any additional or different increased risks than those contained in the contract; and in approving a holding of the trial court that notwithstanding the specific warning it erroneously construed to be embraced in Exhibit 22, affording plaintiff an unusual locus poenitentiae, it pressed on to the indicated outcome; especially when defendant did not plead a modification of the contract, nor that plaintiff assumed any additional risks thereto, and made no such claim at the trial.

9. In failing to hold that Exhibit 25 expressly provided plaintiff was willing to enter into the contract and to perform same in "accordance with the plans and specifications" and defendant so understood it; and that inasmuch as both said Exhibits pertained to negotiations prior to the contract, and were not mentioned nor referred to therein, they formed no part of the contract, and were of no legal effect to modify or change the terms of the contract.

10. In failing to hold that the purpose of defendant in introducing said Exhibits was solely to show that plaintiff's losses proximately resulted from its so-called "unbalanced bid", and that plaintiff having shown without contradiction, that by reason thereof, (by computing the actual quantities of materials used at the unit item price) it had actually reduced its losses by \$4211, defendant had failed to sustain the burden of proof, and none of plaintiff's losses were sustained on account of any specific warning in Exhibit 22, and said exhibit was of no further legal effect.

11. In holding that plaintiff cannot recover outside of the contract, because it was "intended to cover all matters connected with the work contracted for. The matters of changes and extra work were expressly provided for. The provisions make the filing of a claim in writing within specified times a condition precedent to the contractor's right to receive additional compensation; nor was it waived. The evidence supporting these findings need not be reviewed; it will suffice to say that it was amply sufficient."

Such a holding is clearly erroneous because regardless of the magnitude and cost of work done under oral requests, directions and requirements of defendant by plaintiff, even though it was not within the scope of the contract, and not reasonably within the contemplation of the parties when they made it, plaintiff may not recover therefor, except by compliance with the literal terms of said contract.

12. In failing to hold that the very giving of oral directions by defendant for the performance of work not within the scope of the contract as originally contemplated by the parties, and standing by and seeing it performed by plaintiff, at great cost and expense amounting to 50% of the contract price, and causing the time to overrun by 50% of the stipulated time for completion of the work, constituted a waiver of the provisions of Ex. A, pp. 21-22; D (1) and (2); and that having received and retained the benefits, defendant is estopped to set up said provisions as a bar or defense to this action.

13. In failing to hold that the Special Provisions govern the general provisions; and the specifications govern the plans; and that restrictive language prevails over the general; and in failing to apply said principles to the problems arising out of the fifteen (15) claims involved in accordance with the universal rule of local and general law, and in accordance with the provisions of Exhibit A, p. 40 (next to last paragraph), so that plaintiff was entitled to recover under a proper construction and application of said contract.

14. In construing Ex. A, pp. 21-22, par. D (1) and (2) as conditions precedent and enforcing them if they were, because (a) equity will not enforce them because they are penalties; (b) they form no part of an agreed exchange, and performance will be excused; (c) a limit must be placed on this "method of leading a contractor astray, they are cut-throat provisions to entrap the unwary contractor, and shabby defenses; (d) they result in extreme forfeiture, injustice, hardship and oppression and amount to an unconscionable advantage over plaintiff, and cause defendant to be unjustly enriched at the expense of plaintiff, and the courts are unable to restore the status quo; (e) they should be strictly construed against defendant as it is the author of them; (f) they are executory collateral agreements, without consideration, and the obligation to pay embodied in the main executed contract accrues upon the performance of extra or additional work and its acceptance and enjoyment by defendant.

15. In failing to hold that Exhibits F and G constituted "written orders" within the meaning and in compliance with said provisions, Ex. A, pp. 21-22 D (1) and (2).

16. In failing to find and hold that defendant never requested plaintiff to file with the Engineer an itemized statement of, and vouchers for, the quantities and prices of such work, materials, or damages, as provided by paragraph (2) D, Ex. A, p. 22, so that the only condition precedent mentioned in said provisions never became operative and cannot be effective to defeat recovery for such work, materials, or damages, under the terms of the contract, and defendant waived said provisions by concededly having made no such request; and is estopped to assert said provision to defeat this action.

17. In failing to hold that such provisions (Ex. A, pp. 21-22, D (1) and (2) only apply to extra work of proportionately small amounts, e. g. Exhibits 4, 5, 6 and 7, amounting to less than \$450, made necessary for the construction

of the contemplated sewer, and do not apply to work vitally different in character and cost, as here, which was not within the reasonable contemplation of both parties when they made the contract and upon which the minds of the parties never met.

18. In holding that furnishing written orders by defendant for four small alterations or changes, totalling less than \$450 is conclusive or even material to show lack of waiver, a new or modified contract, or estoppel, especially when it is undisputed that every bit of work done and materials furnished was ordered and directed by defendant, and it stood by and watched and inspected every bit of it, knowing it had given no written orders, and knowing it was not included in the original contract, and received and retains the benefits of same, and knowing that work of such character and cost could not be reasonably interpreted to be included in the contract price, expected, or at least, ought to have expected that it would have to pay the reasonable value thereof, whether any specific bargain was or was not made concerning it.

19. In failing to find or hold that plaintiff relied upon and reasonably understood that defendant's Engineer in Charge, Willard S. Brewer, promised plaintiff that if any extra work was done in compliance with its oral instructions and directions, on the entire job, defendant would pay for same upon final completion of the entire work; and even if no such oral promise was actually made, but plaintiff honestly believed it was, and rendered services and furnished materials which were, in fact, extras, on the strength of such belief, plaintiff should recover their reasonable value.

20. In failing to find or hold that plaintiff complied with said provisions by notifying respondent, within 20 days, after all extra work was completed that it had a claim of upwards of \$50,000 against defendant, and as defendant showed no prejudice resulted, it is estopped to plead such a technicality as a bar to this action.

21. In holding or finding that plaintiff should not recover because it failed to mention extraordinary forced delays in two letters (Exs. U & V) requesting extensions of time to complete the work, because such omission establish all its claims as doubtful, its evidence incredulous, although its books kept in the regular course of business are in evidence, and without dispute, show that it cost plaintiff, including a reasonable profit of \$40,000, the sum of \$199,908.12 to perform the work, and although the trial court found that, exclusive of depreciation on its equipment and of any profits plaintiff's out of pocket expenditures were more than \$20,000 in excess of the payments it had received; and said court further found that it took nine months to complete a six months contract, when defendant neither pleaded nor claimed dissatisfaction with the plaintiff's work, nor of its rate of progress, and other specified things under Exhibit A, p. 27, par. M1.

22. In failing to find that defendant knew in its entirety what work plaintiff had done, and was not prejudiced by any failure to mention the causes of delay in said two letters for extensions of time, and expressly promised consideration of same when the work was finally completed, without making any complaints as to the rate of progress or the performance of the work, and knowing the nature and extent of the work plaintiff was performing and the delays and expense resulting therefrom, it knew or must have known that plaintiff was doing work wholly extra, not within the scope of the contract, and plaintiff should recover for such extras, together with a refund for all the liquidated damages defendant retained, and as to which latter, defendant did not file any counterclaim as required by Rule 13 (a) of Federal Rules of Civil Procedure.

23. In holding that although the specifications do not describe preformed cradle construction and say nothing about allowing time for the cradle to harden, the blue print plan Ex. C, shows this type of construction as Type C and

the specifications provide that the plans and specifications are intended to be cooperative and that all works necessary to the completion of the contract shown on the plans are to be considered as properly described in the specifications. The District Judge was of opinion and we agree, that Ex. C makes it sufficiently clear that the cradle of Type C construction would have to be preformed. The Engineer so interpreted the specifications and plans and the contractor made no objection at the time the work was performed that it was an extra or would delay completion of the contract.

24. In holding that petitioner was on notice that its contract was but part of a larger project and Exhibit B itself showed that the point markes as the "Beginning of Contract No. 18" and was the "End of Contract No. 16." There was no justification for assuming that the dotted lines indicated an existing sewer. Moreover, several weeks before Mr. Ciraci signed the contract on behalf of the plaintiff he knew there was no outlet at Farmington Avenue. The claim is untenable."

25. In holding that Claim No. 3 involves only work covered by the contract.

26. In holding that the delays upon which Claim No. 15 are based were not due to any deviations by defendant from the terms of the contract; that the contract was correctly construed and the evidence supports the finding.

27. In holding that the remaining claims involve relatively small amounts when they involve about \$8000, and most of them are based upon provisions in the contract that specifically make them extras under the terms thereof.

28. In failing to hold that plaintiff should recover because it was confronted with unforeseen difficulties and unanticipated circumstances, not within the contemplation of the parties when the contract was made, which rendered its performance impossible from a commercial standpoint, unduly onerous, and it is inequitable to throw the loss on

plaintiff because they resulted in deviations from said contract, plans and specifications upon the basis of which the parties contracted, to a substantial extent, rendering its demand for extra pay manifestly fair and rebuts all inferences that it is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of defendant to coerce it to pay further compensation.

29. In failing to hold that the purpose of defendant in submitting documents to bidders and in making representations thereby was to supply information to bidders upon the job, who were expected to act upon it and entitled to act upon it in making their bids, and to secure bids upon the basis of the work represented to be required, and to apprise them reasonably as to the character quality, quantity, methods of construction, and cost of the work; such representations here are based upon actual investigation of sub-soil and subsurface conditions and structures by competent engineers and technicians of defendant, and were adopted as its own, and carried with them the assertion of superior knowledge and information, and are authoritative; and plaintiff was entitled to rely upon them and did rely upon them, and as the time was too short, and defendant did not expect plaintiff to make an independent personal investigation, but expected it to act upon the documents submitted to bidders, and plaintiff was induced thereby to make its bid and enter the contract. Defendant is responsible for the consequences of plaintiff's reliance upon its representations, and as they were misleading, and misstatements of actual conditions encountered in the trench and the work turned out to be vitally different in character and cost from that so represented, defendant should pay plaintiff for its loss, expense or additional cost, plus a reasonable profit, under the contract, or outside of the contract, and this is so even though such misrepresentations were made innocently and in good faith, and defendant truthfully set forth all the information it actually had or knew.

30. In failing to hold that such misrepresentations need not amount to fraud, but give rise to a cause of action in the nature of a breach of warranty, and of the sufficiency of the plans for the purposes intended, or recovery may be had for plaintiff on the ground of mistake, new and different work, out of the scope of the contract, breach of contract, breach of an implied warranty, misrepresentation, restitution in damages; reformation by damages, estoppel, unjust enrichment, quantum meruit, quasi-contract, implied contract, fraud, actual or constructive, concealment, nondisclosure, bad faith, and other grounds claimed at the trial, so that plaintiff is entitled to recover the reasonable cost of the work, plus a reasonable profit, under the contract, or outside of the contract.

31. In failing to find and hold that to give effect to such exculpatory clauses in inequitable and against public policy, because defendant cannot legally exonerate itself from fraud, misrepresentation or concealments and non-disclosures by the inclusion of them in the contract.

32. In refusing to hold that plaintiff ought at least to be made whole for its losses, expenditures and a reasonable profit thereon; in refusing to find and hold that prima facie they are reasonable; and it will not be presumed that losses and expenditures incurred in a fair endeavor to do the work ordered and requested by defendant were foolishly or unreasonably incurred, but it is incumbent on defendant to prove that they were foolishly or unreasonably incurred; and in failing and refusing to assess damages because of the difficulty of making such assessment, and plaintiff having laid the foundation for their assessment, it was clearly error to refuse to award damages for any or all of these claims.

33. In failing to find and hold that the Engineer did not act in good faith and did not exercise an honest judgment throughout the performance of his duties as engineer in respect to these claims.

34. For brevity, each and every one of the Assignments of Errors contained in the Printed Record, pp. 76-124 are hereby respectively reassigned and made a part hereof as fully as if set forth herein.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

This case presents questions of the first importance relating to the construction and interpretation of Municipal and Private Building Contracts containing all the usual exculpatory clauses *except* one against "unforeseen difficulty" and "unanticipated circumstances"; and whether or not recovery must be denied to a contractor because of the existence of such a contract, when some or all of the exculpatory provisions have not been complied with, and especially, when all or part of the usual clause relating to Changes and Extra Work have not been complied with, thus impelling the Courts to declare a forfeiture of extra work and material furnished although they were orally ordered and directed to be done by a contractor and the contractee stood by day by day and saw his oral orders and directions being fulfilled by the contractor, and work and material of substantial magnitude rendered and furnished thereunder knowing it had not given "written orders" for same as required by the contract, and knowing it did not expect to pay contractor for same when the contract was fully performed; and the usual clause making the "Engineer to be the Judge" so that as interpreted, this clause not only makes him the judge of the facts *but of the law of the contract and its construction*, and no recovery allowed unless he *concedes* that the facts and the law of the contract, as construed by him, warrants a recovery; and, finally whether or not recovery "outside the contract" on the basis of waiver, estoppel, unjust enrichment, quasi-contract, breach of contract, warranty of the plans, express or implied, or in the nature of a breach of warranty; unforeseen difficulty or unantici-

pated circumstances not within the reasonable contemplation of the parties when they made the contract, new or additional work, and quantum meruit, innocent misrepresentations, on an implied contract, in law or in fact, mistake, uni-lateral or mutual, and other usual equitable and legal remedies applied to afford relief to contractors, may be had.

An early authoritative decision of these questions by this Honorable Court is of great importance, not only to the parties, but to Public and Private Building and Construction contractors and to owners requiring their services; and the issue of a Writ of Certiorari appears in order.

There is no jurisdictional question involved, as petitioner is a corporation, existing under the laws of Ohio, and the respondent is a municipal corporation, existing under the laws of Connecticut; the action involves \$68,632, exclusive of interest and costs, and procedural requirements have been complied with, so that the decision sought to be reviewed is based squarely on the *merits of the issues presented*.

Aside from the importance of the issues presented, the decision should be reviewed for the additional reason, we submit, that it is clearly erroneous and not in accord with the principles of applicable *local laws and decisions of the Supreme Court of Errors of the State of Connecticut*, where the contract was made and performed and which were impliedly made a part of the contract as if they were set out at length therein.

It is also clearly erroneous and not in accord with the principles and applicable decisions of this Honorable Court.

It probably conflicts with the applicable decisions of other United States Circuit Court of Appeals.

It probably conflicts with the principles and applicable decisions of the highest Courts of other States constituting the weight of authority, or the better reasoned cases.

It is not in accord with the decisions of the highest Court of the State of Connecticut in the following cases:

- Alford v. Belden, 4 Conn., 461, 464. (1823)
Connelly v. Devoe, 37 Conn., 570 (1872)
Tryon v. Corbin, 62 Conn., 161.
Scholfield Etc. Co., v. Scholfield, 71 Conn., 1-19.
Water Comrs. v. Robbins, 82 Conn., 623-644.
Mahoney v. Hartford Invest. Co., 82 Conn., 280.
Casey v. MacFarlane, 83 Conn., 442-443.
Tompkins v. Bridgeport, 100 Conn., 147, 152.
Clover Mfg. Co., v. Austin, 101 Conn., 212, 214.
Brett v. Cooney, 75 Conn., 338.
Tompkins v. Bridgeport, 94 Conn., 659, 680.
Hills v. Farmington, 70 Conn., 450.
Fagerholm v. Neilson, 93 Conn., 388.
Oloughlin v. Poli, 82 Conn., 427, 435.
Politziner Bros. v. Vanetch, 101 Conn., 265.
Fischer v. Kennedy, 106 Conn., 484, 492-7.
Geremia v. Boyarsky, 107 Conn., 391.
Blakeslee v. Water Comrs., 106 Conn., 642ff.
Blakeslee v. Water Comrs., 121 Conn., 163.
E. & F. Constr. Co., v. Stamford, 114 Conn., 250, 254.
Ball v. Pardy Constr. Co., 108 Conn., 549.
Doeltz v. Longshore, Inc., 126 Conn., 597.
Dean v. Hershowitz, 119 Conn., 398, 412.
Wray v. Fairfield Amusement Co., 126 Conn., 227.
Elbertson Cotton Mills, v. Ind. Ins. Co., 108 Conn., 710.
and other cases contained in petitioner's Brief.

It is clearly not in accord with the following decisions of this Honorable Court, as shown by the following cases:

Henderson Bridge Co., v. McGrath, 134 U. S. 260.
Hollerbach v. United States, 233 U. S. 165.
Christie v. United States, 237 U. S. 234.
United States v. Stage Co., 199 U. S. 414, 424.
United States v. Spearin, 248 U. S. 132.
Freund v. United States, 260 U. S. 60.
Binney v. Chesapeake Etc. Co., 33 U. S. 201.
Bogardus v. Comr., 302 U. S. 34.
United States v. Smith, 256 U. S. 1.
United States v. Cook, 257 U. S. 523.
United States v. Behan, 110 U. S. 338, 344.
and others appearing in the Brief.

It probably conflicts with applicable decisions of different United States Circuit Court of Appeals and with other decisions of the Second Circuit.

Montrose Constr. Co., v. Westchester, 80 F. 2d 841 (2d. Cir.).
Salt Lake City v. Smith, 104 F. 457.
United Constr. Co., v. Haverhill, (2d Cir.), 9 F. 2d, 538.
Pitt. Constr. Co. v. Alliance, (6th. Cir.), 12 F. 2d, 28.
Bankers Trust Co., v. Hale & Kilburn Corp., (2d Cir.), 84 F. 2d, 401.
Drainage Dist. v. Rude, 21 F. 2d, 261.
Luntz v. Wheeler, 113 F. 2d, 767.
Rosen v. Furnbilt Stores Inc., 103 F. 2d, 294.
United States v. So. Gaby Co., 107 F. 2d, 3.

Cowen Co. v. Hanck Mfg. Co., 249 F. 285.

Bush v. Jones, 144 F. 942.

New York v. Pa. Steel Co., 206 F. 455.

Sartoris v. Utah Constr. Co., (9th Cir) 21 F. 2d, 1.
Certiorari denied, 278 U. S. 651.

Dock Contracting Co., v. New York, 296 F. (2d
Cir) 377.

Kilby Mfg. Co., v. Hinchman etc. Co., 66 C. C. A.
67.

The Sappho, 94 F. 543.

Caldwell v. Schmulback, 175 F. 179.

United Steel Co. v. Casey, 262 F. 889.

and other cases cited in our Brief.

It is probably in conflict with the weight of authority,
the better reasoned cases, and modern applicable decisions.

Annotation, 76 A. L. R. 268 et seq., and cases
cited.

Annotation, 66 A. L. R. 650, et seq., and cases
cited.

Annotation, 137 A. L. R. 530, et seq., and cases
cited.

and cases cited in the Brief.

In the interest of brevity (Rule 38, par. 2, Furniss, Withy
& Co. Ltd. v. Yang-sze Asso. Ltd., 242 U. S. 430) plaintiff
does not herein set forth all the points which will be urged
at the argument on the merits should the writ be granted
nor all the contentions in support of such points; but, in
order to comply with the Rule of this Court requiring that
all issues upon which decision is requested be presented in
the Petition for Certiorari (Gunning v. Cooley, 281 U. S.
90, 98) plaintiff here refers to and incorporates into this
petition all the matters presented in its Assignments of

Errors (R. pp. 76-124) on the appeal to the United States Circuit Court of Appeals for the Second Circuit, with the same force and effect as if herein set out in full.

Wherefore your petitioner respectfully prays that a Writ of Certiorari be granted and it herewith files on Original Transcript of the Printed Record, duly certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit, and 9 copies of same as printed below, together with the proceedings had in the said Circuit Court; forty (40) printed copies of this Petition, and the supporting brief annexed to the Petition; the Original Exhibits and Three Transcripts of the Evidence designated on Appeal, which were made a part of the Record as aforesaid; and prays that the judgment of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Court; and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Hartford, Connecticut, this the 24th day of May, 1943.

GEORGE H. COHEN,

A member of the bar of the United States
Supreme Court, and

UFA E. GUTHRIE. Counsel for Petitioner.
36 Pearl Street, Hartford, Connecticut.

